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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-783

WILBURN E. PAYNE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

WILBURN E. PAYNE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision herein of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on September 24, 1979, petition for rehearing having been denied on October 22, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 602 F.2d 1215. The opinion is set forth in the appendix to this Petition. The denial of Petitioner's Motion For Rehearing has not yet been officially reported. By its

opinion, the Court of Appeals reversed the judgment of the United States District Court for the Middle District of Georgia which dismissed the indictment against Petitioner.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on September 24, 1979; petition for rehearing was denied on October 22, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Did the lower court err in holding that 18 U.S.C. § 1014 includes within its proscription a check exchange procedure wherein the checks of one individual are used to cover overdrafts of the other involved individual and vice versa?

A. Is the passing of a check which creates an overdraft at the drawee bank an "overvaluation of security" as that phrase is used in 18 U.S.C. § 1014 when the drawee bank has, by course of conduct, agreed to a line of credit to cover drawer's overdrafts?

B. Is the passing of a check an overdraft at the drawee's bank a "false statement" as that phrase is used in 18 U.S.C. § 1014 when the drawee bank has, by course of conduct, agreed to a line of credit to cover drawer's overdrafts?

C. Did Congress intend, by the 1970 amendment to 18 U.S.C. § 1014, to broaden the scope of the statute to include overdraft check situations

and thereby expand federal criminal jurisdiction?

(2) If the exchange of worthless checks and subsequent deposit of same is a technical violation of 18 U.S.C. § 1014, does such an application of the statute render it unconstitutionally vague and a violation of Defendant's right to due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES

(1) United States Code Annotated, Amendment V

(2) Title 18, United States Code Annotated, Section 1014

The text of the provisions cited above will be found reproduced in the appendix, beginning at page 10a.

STATEMENT

The facts pertinent to this criminal action reveal that the Petitioner was the owner of an automobile auction company with a business checking account at the Toney Brothers Bank. That bank agreed to and did honor the Petitioner's overdrafts on a regular and customary basis. Booker Fountain owned two sole proprietorships dealing in automobiles and he had a business checking account with the Bank of Alapaha. That bank also agreed to and did honor its customer's overdrafts on a regular customary basis.

During the course of business operations Fountain sold automobiles from one of his companies to another. The Petitioner's auction company would purchase the vehicles by check and then resell the vehicles to the other company, receiving from that company a check

for the purchase price plus the auction company's profit.

The Petitioner and Fountain would then deposit the other's checks in their respective banks and those checks would proceed through normal banking channels to the drawee banks where they were paid as a matter of course, without regard to immediate balances in the accounts. The Petitioner's overdrafts would then be covered by the deposit of monies received in the operation of his business, including those checks received by the Petitioner from Fountain. Each bank gave immediate credit for those checks.

Subsequent to the banks' cessation of check credits to their customers (after certain auditing procedures), the Petitioner was indicted by the Grand Jury for the United States District Court for the Middle District of Georgia. The Petitioner filed his Motion To Dismiss and that Motion was granted.

The United States Court of Appeals for the Fifth Circuit reversed, holding that the alleged scheme was within the terms and proscription of 18 U.S.C. § 1014. Specifically, the Court held that a worthless check is a false statement; a check is a "security" for the purpose of the statute in question; payment of a check creating an overdraft constitutes a loan or extension of credit; and Congress, by its 1970 statutory amendment which extended its scope to institutions insured by the Federal Deposit Insurance Corporation, 84 Stat. 1017, intended to bring within the coverage of the statute "all undertakings which might subject the F.D.I.C. insured bank to risk of loss". The Court did not discuss Petitioner's contention that, if the alleged acts are within the statute's proscriptions, then the statute is void for vague-

ness as to that particular application and fails to reasonably place an individual on notice as to what is proscribed. Petitioner moved for a rehearing which was denied on October 22, 1979.

REASONS FOR GRANTING THE WRIT

This Petition raises substantial and important questions of federal criminal law which have not, but should be, settled by this Court. The decision of the Court of Appeals is in conflict with decisions of this Court.

I. In Reversing the Lower Court, the United States Court of Appeals Incorrectly Held That 18 U.S.C. § 1014 Included Within Its Proscription Transactions in Which Two Individuals Exchanged Checks Creating Overdrafts Which the Drawee Banks Had Agreed to Honor as a Matter of Course.

In reversing the District Court, the United States Court of Appeals for the Fifth Circuit held, in a case of first impression in the appellate courts, that a "check kite" scheme was within the proscriptions of 18 U.S.C. § 1014. The facts as set forth in this Petition do not constitute a violation of 18 U.S.C. § 1014. First, the terms of the statute exclude the type of conduct here in question. Second, Congress' intent was not to include such conduct within the reach of the statute, nor is the language of § 1014, as amended, so clear as to warrant an expansion of the statute's scope.

In order to prove a violation of 18 U.S.C. § 1014, the Respondent must initially show either a false statement or willful overvaluation of any land, property, or security by the Petitioner. The Respondent can show neither. In the only reported case involving a prosecution under 18 U.S.C. § 1014 for a worthless check scheme, the Government argued that a worthless check

was a false statement. *United States* v. *Edwards,* 455 F. Supp. 1354 (M.D. Pa. 1978). That court noted that

> . . . a check itself is not the type of statement which can be true or false. (Defendant) contends that a check is simply a direction to a bank to pay the instrument according to its terms. A direction can be neither true nor false. The Uniform Commercial Code defines a check as a draft drawn on a bank, payable on demand, payable to either order or bearer, signed by the drawer and containing an unconditional promise to pay a sum certain. (109A-3-104). As such, if a check is no more than a promise to pay, it cannot be true or false.

at 1356-57. *See Universal C. I. T. Credit Corporation* v. *Guarranty Bank & Trust Company,* 161 F.Supp. 790 (D. Mass. 1958). That court's analysis is correct—a check is an order or direction, not a "statement" and, as such, cannot constitute a "false statement" as anticipated by 18 U.S.C. § 1014.

In order to avoid that argument, Respondent argued below that Petitioner "overvalued securities" by his actions in writing checks without sufficient funds to cover them at the time of presentment. This argument must also fail both because a check is not a security within the contemplation of 18 U.S.C. § 1014 and because there was no overvaluation as anticipated by that statute.

"Securities" are defined as

> evidences of debts or of property. (cite omitted). Evidences of obligations to pay money or of rights to participate in earnings and distribution of corporate, trust, and other property. (cite omitted).

Black's Law Dictionary, 1522 (Rev. 4th ed. 1968). As previously seen, the Uniform Commercial Code defines

a check as a draft on a bank which represents an order or direction to pay. Ga. Code Ann. § 109A-3-104. Thus, while a security is an evidence of obligation or debt, a check is an order to pay money and the latter is not included in the term "security" as used in 18 U.S.C. § 1014.

The statute proscribes the "overvaluing" of securities and this illustrates the distinction between a security and a check for the purposes of the statute. A security is an evidence of indebtedness and has a fluctuating value; it involves an expectation of earnings of some type. Thus, where there is an expectation of profit, courts have held certain intangibles to be securities. *United Housing Foundation, Inc.* v. *Milton Forman,* 421 U.S. 837 (1975); *Securities Exchange Commission* v. *Continental Commodities Corporation,* 497 F.2d 516 (5th Cir. 1974). The value of a security thus depends not just on an amount stated on its face but also upon its earnings and potential for earnings. It can have a market value that varies and is different from any amount stated on its face. It is susceptible to overvaluation by its owner on a net worth statement, credit application listing assets, or other such representation. The cases cited above deal generally with federal securities regulations, but the definition of security used therein, 15 U.S.C. § 77(b)1, fits the purposes to be served by the statute here involved.

A check, being an order for payment, is not such an instrument as to be susceptible to overvaluation. It is an order to the drawee to pay; it is not an investment or earning devise, and its value depends neither on market conditions nor future earning capacity. It is not an asset that could be included in a loan application or net worth statement.

Those cases cited below by Respondent in its argument that a check is a security, each dealt with 18 U.S.C. § 2314, proscribing fraudulent transfer of stolen or forged properties or securities in interstate commerce. That statute is a part of the National Stolen Properties Act, 18 U.S.C. §§ 2311 et seq., and that act contains its own definition of "securities" which specifically includes checks, and is broader than the common definition of "securities". 18 U.S.C. § 2311. That Act is not concerned with such matters as overvaluation of securities but with the transportation of any stolen properties or securities in interstate commerce. The definition, by its terms, is applicable only to the National Stolen Properties Act and is not applicable to 18 U.S.C. § 1014. *See, e.g., United States* v. *Webb,* 443 F.2d 308 (5th Cir. 1971).

Even accepting, arguendo, that a check is a security for the purposes of § 1014, there has been no overvaluation as envisioned by the statute. The Respondent's theory is that there were insufficient funds in Defendant's account to cover the checks as written and, therefore, the checks were worthless even though each check stated a value on its face. Though novel, this argument is invalid. First, as pointed out above, a check is not a document with a value, but a direction to another to pay a sum certain. It cannot be an overvaluation anymore than it can be a false statement.

The Respondent's argument must fail for a more basic reason—the checks involved were not worthless checks in the legal sense. Respondent's statement of the facts it could prove showed that the Toney Brothers Bank gave credit to Petitioner's checks regardless of his balance in the checking account. This was by agreement of the bank and is permitted but not required by

the Uniform Commercial Code. Ga. Code Ann. § 109A-4-401(1). In such a situation, i.e. where the drawer reasonably expects his checks to be paid by agreement with the drawee bank, the check is not "worthless". *Williams* v. *United States,* 278 F.2d 535 (9th Cir. 1960); *United States* v. *Broxmeyer,* 192 F.2d 230 (2d Cir. 1951); *See* 9 A.L.R. 3d 719 and cases collected therein. Under the factual situation as set forth by the United States Attorney, Petitioner had more than a reasonable expectation that the checks would be covered—they were in fact, being even before the factual situation here under consideration occurred. The checks were not worthless. They were good checks pursuant to a preexisting agreement with the Toney Brothers Bank. Since they were not by definition "worthless", there was no overvaluation by the Petitioner of a security (or any other instrument).

The legislative history of 18 U.S.C. § 1014 is as important for what is not included as that which is included. The particular statute was but one item in the revision of the federal criminal code. 62 Stat. 752 (1948). The statute is a compilation of thirteen previously existing statutes. 7 U.S.C. § 1026(a), 1514(a); 12 U.S.C. §§ 596, 981, 1122, 1123, 1138(a), 1248, 1312, 1313, 1441(a), 1467(c); 15 U.S.C. § 616(a) (1940). *See Reviser's Notes,* 18 U.S.C. § 1014. The statute, as originally enacted, was applicable only to applications and transactions entered into with the Reconstruction Finance Corporation, the Farm Credit Administration, the Federal Crop Insurance Corporation, the Farmer's Home Corporation, the Federal Home Loan Bank, any federal savings and loan association, any federal land bank, and any federal reserve bank. *Reviser's Notes,* 18 U.S.C. § 1014; *United States* v. *Edwards,* 455 F.

Supp. 1354 (M.D. Pa. 1978). None of these institutions included in the terms of the original statute were involved in the business of check cashing, maintenance of checking accounts, or accepting checks for deposit. They were in the business of making home and farm loans. "Therefore, when Congress enacted the original version of the statute, it clearly did not intend to cover the presentation of worthless checks." *United States* v. *Edwards,* at 1357. *See United States* v. *Sabatino,* 485 F.2d 540 (2d Cir. 1973). It was not until 1970 that Congress included federally insured banks within the coverage of the statute. 84 Stat. 1017. ". . .(N)othing in the legislative history nor in the amendment to the statute indicates that by the addition of such banks Congress intended to make the presentation of worthless checks to those banks a federal crime." *United States* v. *Edwards,* at 1357.

The Respondent argued below that *United States* v. *Sabatino,* 485 F.2d 540 (2d Cir. 1973), stands for the proposition that § 1014 is amenable to expansion to transactions not previously included, in that case applications for automobile loans. That did, however, deal with a "loan" transaction, and loan transactions are specifically included in the language of § 1014. In addition, two originally covered institutions, federal reserve banks and the Reconstruction Finance Corporation, were not limited solely to home and farm loans, as were the other originally covered institutions. *United States* v. *Sabatino.* Even they, however, were not in the check cashing or depositing business. As noted by the court in *Sabatino,* the literal terms of the statute were applicable to the transaction there involved. The statute is not literally applicable to the present situation.

The history of this statute lends support, also, for the previous discussion concerning exclusion of this transaction from the express terms of § 1014. The statute, as originally enacted, (and as it existed until 1970) did not include within its scope institutions providing checking services. For that reason, Congress could not have intended to include checks within the term "security". Congress intended to include as "securities" the type assets that would have been exhibited by a holder as assets in attempting to secure credit. Likewise, the statute initially contemplated overvaluation of securities as statements of a security value in excess of its market value. Congress could not have intended that which could not have occurred. If Congress had intended to include transactions and instruments not previously included within the terms of § 1014 it could have done so. It did not.

II. If 18 U.S.C. § 1014 Is Construed to Include the Factual Situation Here Involved Then the Statute Does Not Put One on Notice That His Actions Are Proscribed and the Statute Is Unconstitutionally Vague.

The Court of Appeals' decision construing the statute to include the factual situation here involved conflicts with those decisions of this Court holding that:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. *Harriss,* 347 U.S. 612, 617 (1954).

> '. . . (w)hen choice has to be made between two readings of what conduct Congress has made a

> crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Toussie v. *United States,* 397 U.S. 112, 122 (1970). "(A)mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity", *Rewis* v. *United States,* 401 U.S. 808, 812 (1971); doubt must be resolved in favor of the Petitioner. The intent of Congress, the meanings of "security" and "overvaluation" are more than mere doubts. They certainly indicate that the statute does not place a Defendant on notice of criminality in "plain and unmistakable" terms.

United States v. *Sabatino,* 485 F.2d 540 (2d Cir. 1973), is not authority for the proposition that the 1970 Amendment was an expression of intention by Congress to include Petitioner's conduct within the scope of § 1014. As discussed previously, that case did involve a loan transaction, it did not involve worthless checks or any related matter. The *Sabatino* factual situation was within the express terms of the statute. The factual situation presented in this Petition is not.

Although most cases dealing with an unconstitutionally vague statute are concerned that the statute is too broadly drawn, the principle clearly applies to the same effect when a statute is so narrowly drawn that one must guess as to how widely it can apply. *See Bouie* v. *City of Columbia,* 378 U.S. 352 (1964). As that case indicates, an unforeseeable judicial enlargement of a criminal statute under which a petitioner is convicted for conduct which had hitherto not been declared illegal operates precisely like an *ex post facto* law.

> When a statute on its face is narrow and precise, however, it lulls the potential petitioner into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes", as in *Lanzetta,* or to "guess at (the statute's) meaning and differ as to its application", as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

Bouie v. *City of Columbia,* 378 U.S. at 352. To now apply 18 U.S.C. § 1014 in such a fashion that the conduct of Petitioner as asserted in the indictment is punishable pursuant to the statute would result in the precise evil which this court finds so objectionable as to be unconstitutional. If 18 U.S.C. § 1014 is technically applicable to the conduct as indicated in the indictment, then such statute is clearly unconstitutionally vague.

Interpretation of § 1014 by the Court of Appeals broadens the scope of federal criminal prosecutions to include the present transaction. Heretofore, it has been held that a "check kite" is a violation of 18 U.S.C. § 1341 when the scheme included utilization of the mails. *Gregory* v. *United States,* 253 F.2d 104 (5th Cir. 1958); or 18 U.S.C. § 656; *United States* v. *Martsinger,* 191 F.2d 1014 (3rd Cir. 1951); but when the mails were not involved, it has been held that such a scheme is not an offense against the laws of the United States. *United States* v. *Britzman,* 547 F.2d 380 (7th Cir.

1977). It has been the use of the mails that has removed such cases from state to federal cognizance.

> Normally, the use of the mails is an incident, frequently unintended, to what is otherwise a local scheme of state cognizance.

Gregory v. *United States*, 253 F.2d 104 (5th Cir. 1958). Just as the inclusion of a Defendant within the terms of a statute must be clear and unambiguous, so must the intent be clearly expressed to expand federal criminal jurisdiction. *United States* v. *Sabatino*, 485 F.2d 540 (2d Cir. 1973).

> (U)nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

United States v. *Bass*, 404 U.S. 336, 349 (1971). There are several Georgia statutes within which transactions such as the present one could be included. *See, e.g.*, Ga. Code Ann. § 26-1803, (Theft By Deception) § 26-1704 (Bad Checks). The 1970 amendment to § 1014 expressed an intention to include within its coverage additional institutions—not an intention to otherwise expand the scope of federal jurisdiction to include additional types of transactions.

CONCLUSION

For the reasons set forth above, this petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA, *Plaintiff-Appellant*,

v.

WILBURN E. PAYNE, *Defendant-Appellee.*

No. 78-3735

United States Court of Appeals, Fifth Circuit

September 24, 1979.

Rehearing and Rehearing En Banc
Denied October 22, 1979

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.
WISDOM, Circuit Judge.

This appeal presents the question whether "check kiting" [1] violates 18 U.S.C. § 1014. We hold that it does. After a hearing in which the government proffered detailed proof of what its evidence would show if the case were allowed to go to trial, the district court dismissed the indictment on the ground that check kiting does not violate 18 U.S.C. § 1014. We reverse.

I.

Section 1014 of Title 18 U.S.C. in pertinent part provides:

> Whoever knowingly makes any false statement or . . . willfully overvalues any . . . property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by

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[1] "Check kiting" as used here does not refer just to drawing of checks against uncollected funds, but means the "getting of money or credit by using bad checks," that is the "use of a bad check or similar fictitious worthless commercial paper . . . to raise money or maintain credit temporarily." Web's New World Dictionary 778 (2d college ed. (1972).

> the Federal Deposit Insurance Corporation [FDIC] . . . upon any . . . advance . . . or loan . . . or extension of the same . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Section 1005 of Title 18 provides that it is an offense against the United States to make and cause to be made false entries in the books, reports, and records of certain banks with the intent to deceive the officers of such banks. Count one of the indictment charges that Wilburn E. Payne, the defendant-appellee, conspired with certain others, in violation of §§ 1014 and 1005, wilfully to overvalue securities for the purpose of influencing the actions of banks, insured by the Federal Deposit Insurance Corporation (FDIC), to make advances and extension of credit. Eight substantive counts allege the details of the check kiting scheme.

Payne operated the South Georgia Auto Auction, Inc., a dealer's used car auction in Valdosta, Georgia. He kept the company's business account at the Toney Brothers Bank in Doerun, Georgia. Booker T. Fountain, the co-conspirator, operated a used car business in Berrien County, Georgia, in the town of Nashville. Fountain had two companies, sole proprietorships, Northside Motors and Berrien Auto Sales, which had company checking accounts at the Bank of Alapaha, Nashville, Georgia.

On October 1, 1977, the Bank of Alapaha informed Fountain that it would no longer give him immediate credit on sight drafts presented for collection in operating his used car business. It would continue to give immediate credit for checks deposited in the bank. Fountain then went to Payne and informed him of his problem. The two agreed to exchange checks. Fountain would sell an automobile to himself through Payne's company, South Georgia Auto Auction, Inc., and as the buyer pay for it with a check to the company. South Georgia Auction would then issue a

corresponding company check to Fountain as the seller of the automobile after deducting $40 as an auction fee.

The sales Fountain made to himself through Payne's company were fictitious. The automobiles did not exist. Indeed, during December 1977 and January 1978 Fountain sold to himself the same nonexistent automobile seven or eight times a week. These fictitious sales were all recorded on the books of South Georgia Auto Auction and, of course, Payne knew that the sales were fictitious. After an exchange of checks, each would deposit in his bank the other's check. Fountain put the South Georgia Auto Auction checks into his account at the Bank of Alapaha. Payne would deposit Foutain' checks in the South Georgia Auto Auction account at the Toney Brothers Bank.

The scheme operated successfully from October 1, 1977 through January 1978. Fountain used the immediate credit he received from the Bank of Alapaha to operate his business. Payne used the funds from the kite to operate his business. In some instances Payne gave Fountain checks drawn on the account of South Georgia Auction when the account was overdrawn $40,000 to $50,000; on one occasion, by $100,000. When a Georgia State bank examiner spotted the kite and put an end to the scheme, the Bank of Alapaha was left with $178,000 in worthless checks.

The district court issued a brief order dismissing the indictment because counts two through nine did "not state facts sufficient to constitute an offense against the United States"; that therefore the "facts alleged in count one would not constitute a conspiracy to violate the laws of the United States".

II.

On appeal, the government argues that a check is a security within the meaning of the statute. Each time one of the checks in the kite was presented to a bank, the defend-

ant was misrepresenting the value of the check. The bank's giving of immediate credit on the deposit of each check constituted an extension of credit or a loan or an advance. The presentation of worthless checks to a bank, therefore, is a transaction intended by Congress to be covered by the statute. We agree with this argument. We note that this case does not involve an isolated transaction in which a bank account is, in good faith, overdrawn. Here we have an extended series of transactions involving the extension of credit based on the defendant's wilfull misrepresentation.

A. The defendant's argument on appeal is essentially the same as the reasoning articulated in *United States v. Edwards,* M.D.Pa.1978, 455 F.Supp. 1354. *Edwards* appears to be the only case directly in point. The facts are indistinguishable from the facts here presented, except that the kite here was a two-man kite.

The key language in *Edwards,* on which the defendant relies is as follows:

> presenting a check to a federally insured bank is not a "statement" which can be rendered false by the fact that the drawer of the check does not possess sufficient funds to cover the instrument but is an order to the drawee bank to pay the instrument according to its terms. . . .
>
> . . . . . .
>
> . . . a check itself is not the type of statement which can be true or false. [Defendant] contends that a check is simply a direction to a bank to pay the instrument according to its terms. A direction can be neither true nor false. The Uniform Commercial Code defines a check as a draft drawn on a bank, payable on demand, payable to either order or bearer, signed by the drawer and containing an unconditional promise to pay a

> sum certain. [109A-3-104]. As such, if a check is no more than a promise to pay, it cannot be true or false.

455 F.Supp. at 1356.

There has never been any doubt that a check is a "direction to a bank to pay" or that a check is "a promise to pay". But this over-simplified description of a check is not inconsistent with the necessary implications a check carries. "In giving a check, the drawer impliedly represents that he has on deposit with the drawee banks funds equivalent to the face amount of the check." Whitney, The Law of Modern Commercial Practices, § 341 (1965). If payment of the check depends on the deposit of the check of another, the necessary implication is that the other's check will be paid from an account having funds at least equivalent to the face amount of the check. We consider that the necessary implications which a check carries, and of which Payne and Fountain were fully aware, are the legal equivalent of a representation or statement as to the value of the checks. Here, we are not dealing with a man careless in balancing his check-book. We have here two business men who contrived a kiting scheme that would have the effect of giving them *credit* or a *loan* or an *advance* on their false representation of the value of their checks. It is unnecessary to belabor the point that a check is more than a simple "order or direction". All states have "bad check" laws based on the concept that giving a kited check is a form of fraud and misrepresentation. *See,* for example, Ga.Code Ann. 26-1704.

B. The language of 18 U.S.C. 1014 is not a barrier to prosecution in this case. A check is a "security". In 18 U.S.C. § 2311, relating to stolen property, "security" is specifically defined to include "any . . . check". In *United States v. Huntley,* 5 Cir. 1976, 535 F.2d 1400, 1403, this Court held that "checks fall within the broader class of 'falsely made' *securities* whose interstate transportation is

forbidden by § 2314". The Uniform Commercial Code states: "A bank has a security interest in . . . an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied . . . [and] if it makes an advance on or against the item" Ga.Code Ann. 109A-4-208(1)(a) and (c).

C. to fall within 18 U.S.C. § 1014 the overvaluation must be "for the purpose of influencing in any way the action of . . . any bank . . . upon any . . . advance, . . . or loan". The essence of check kiting is the obtaining of credit in the nature of an advance or loan, however it may be characterized.

In *United States v. Western Contract Corp.*, 8 Cir. 1965, 341 F.2d 383, 386 the court concluded:

> "'It is our opinion that although the extension of credit or the allowance of the privilege of writing checks before final clearance of the deposited check is not a formal loan evidenced by a note with agreed interest and possibly some collateral, it is a transaction in the nature of a loan, perhaps more properly termed an advance of money.'"

In *Universal C.I.T. Corp. v. Guarantee Bank and Trust Co.*, D.C.Mass.1958, 161 F.Supp. 790, 793, the court went further:

> "Where the bank allows a customer to draw against an uncollected item, particularly in the face of a contract recognizing that the depositor has no right to demand such a privilege, both parties would ordinarily view this allowance not as an unsecured loan upon the customer's general credit but as a bank loan buttressed by the security of the uncollected item."

And, as noted, the Uniform Commercial Code gives a bank a security interest in a deposited item, if an advance has

been made against the item. Ga.Code. Ann 109A-4-208 (1)(c).

Other courts prefer to characterize check kiting "as a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two banks". *Falconi v. Federal Deposit Insurance Corp.*, 3 Cir. 1958, 257 F.2d 287, 289. In *Fidelity and Casualty Company of New York v. Bank of Altenburg*, 8 Cir. 1954, 216 F.2d 294, 302-303, the court declined to characterize the advance of money pursuant to a check kite scheme as a loan, but said:

> "Check kiting, as practiced here, involves more than the mere use of a check with insufficient funds in the bank to meet it. It involves a series of acts which taken together constitute a scheme, a studied device, false pretenses built upon a series of false representations designed to lull the bank involved into a feeling of confidence and security. A bad check is given. Money or credit is received from a bank other than the one on which the check is drawn. If credit is taken, that credit is usually drawn on immediately. The check kiter than deposits a check in the bank upon which the first check is drawn before the first check arrives there. The second check is drawn on the bank from which the first money or credit is received. Credit is taken for it and that credit covers the first check when it comes in and possibly additional credit. Then the process is carried on, back and forth, until the scheme is discovered."

In short, check kiting, as engaged in by Payne and Fountain, was a device for fraudulently obtaining credit sufficiently in the nature of an advance or loan to come within the scope of 18 U.S.C. § 1014.

III.

The legislative history is meager. In the 1948 codification of Title 18, Section 1014 reduced to a single section

thirteen existing statutes.[2] Act of June 25, 1948, c. 645, 62 Stat. 752. Most of these statutes dealt with false statements in connection with farming and loans from such agencies as the Farm Credit Administration, the Federal Crop Insurance Corporation, the Farmers' Home Corporation, and the Federal Home Loan Bank. Two of the statutes, however, involved federal agencies that were not limited to lending for farm or home construction: Federal Reserve Banks (former 12 U.S.C. § 596) and the Reconstruction Finance Corporation (15 U.S.C. § 616(a). The revisor's notes state that the enumeration of "application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan" does not occur in any one of the thirteen predecessor sections, but that the enumeration represents a composite of terms and transactions mentioned somewhere in each section. Later additions, deletions, and amendments occurred from 1949 through 1970. The most extensive changes were made in 1970 with the addition to the statute's coverage of the Federal Deposit Insurance Corporation, FDIC insured banks, the Federal Savings and Loan Insurance Corporation, FSLIC insured institutions, members of the Federal Home Loan Bank System, and the Administrator for the National Credit Union Administration. Thus, by 1970 the codified section was not devoted exclusively to criminal coverage for false applications in the farming and home construction field. *See, e.g., United States v. Sabatino,* 2d Cir. 1973, 485 F.2d 540, 543.

This development leads us to the inference, contrary to the court's conclusions in *Edwards,* that the intent of Congress was to incorporate in one codal section all of the business transactions of any of the specified agencies. The

[2] 7 U.S.C. §§ 1026(a) and 1514(a); 12 U.S.C. §§ 596, 981, 1123, 1138d(a), 1248, 1312, 1313, 1441(a), and 1467(a); and 15 U.S.C. § 616(a).

statute therefore proscribes not only fraudulent statements given in connection with farm or construction loan but "all undertaking[s] which might subject the FDIC insured bank to risk of loss". *United States v. Stoddart,* 10 Cir. 1978, 574 F.2d 1050, 1053.

Payne and Fountain successfully managed a kite for four months with a float that rose to $178,000. They obtained that credit, advance, loan, only by falsely representing the worthless checks as worth their face value. 18 U.S.C. § 1014 makes their misrepresentation a federal offense when the injured bank is insured by the FDIC.

REVERSED.

APPENDIX B

United States Code Annotated, Amendment V provides:

CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code Annotated, Section 1014 provides:

LOAN AND CREDIT APPLICATIONS GENERALLY; RENEWALS AND DISCOUNTS; CROP INSURANCE

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank

Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned nor more than two years, or both.

Supreme Court, U. S.
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No. 79-783

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 602 F. 2d 1215.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1979. A petition for rehearing was denied on October 22, 1979, and the petition for a writ of certiorari was filed on November 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's "check kiting" scheme constituted an offense under 18 U.S.C. 1014.

STATUTE INVOLVED

18 U.S.C. 1014 provides in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any * * * property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation * * * upon any * * * advance * * * or loan * * * or extension of any of the same * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

On September 27, 1978, petitioner was indicted in the United States District Court for the Middle District of Georgia on eight counts of willfully making false statements and overvaluing various securities in order to obtain credit from federally-insured banks, in violation of 18 U.S.C. 1014, and one count of conspiring to violate Section 1014, in violation of 18 U.S.C. 371.[1] Prior to trial, petitioner moved to dismiss the indictment on the grounds that the allegations of the indictment did not state a crime under Section 1014. At a hearing on this motion, the government made a proffer (described in detail below) which showed that petitioner and co-conspirator Booker T. Fountain had operated their respective used car businesses by means of a complicated check kiting scheme (Pet. App. 2a). The district court nonetheless granted petitioner's motion and dismissed the indictment. On the government's appeal, the court of appeals reversed (*id.* at 1a-9a), concluding that

[1]As part of the conspiracy, petitioner was also alleged to have caused the making of false entries in the banks' records, in violation of 18 U.S.C. 1005.

petitioner's "check kiting * * * was a device for fraudulently obtaining credit sufficiently in the nature of an advance or loan to come within the scope of 18 U.S.C. §1014" (*id.* at 7a).

The evidence adduced at the pretrial hearing showed that in September 1977 Fountain's bank informed him that it would no longer advance his two used car dealerships immediate credit on sight drafts but that it would continue to give such credit for checks deposited with the bank. Fountain, who knew that petitioner was also hard pressed for credit, thereafter enlisted petitioner in a fraudulent scheme to obtain credit. The two agreed that Fountain would sell fictitious automobiles to petitioner's business (South Georgia Auto Aunction, Inc.) and that petitioner would then sell the same nonexistent automobiles to Fountain's other dealership. As part of these phantom transactions, Fountain, as buyer, would issue worthless checks to petitioner's company, which in turn would also issue worthless checks to Fountain as seller, after deducting a $40 auction fee per automobile. Fountain and petitioner would then deposit each other's worthless checks[2] in their own accounts and thereby obtain credit to operate their businesses. When a state bank examiner discovered the "check kite" in January 1978, Fountain's bank was left with $178,000 in worthless checks (Pet. App. 2a-3a).

ARGUMENT

Petitioner contends (Pet. 5-11) that his check kiting scheme did not violate 18 U.S.C. 1014 and that therefore the court of appeals erred in reinstating his indictment. At the outset, however, we note that there is no need for

[2]In some instances, petitioner gave Fountain checks drawn on the auction company's account at a time when that account was overdrawn by up to $100,000 (Pet. App. 3a).

the Court to consider petitioner's claim at this time. The ruling below places petitioner in the exact position he would have occupied if the district court had denied his motion to dismiss, and such an interlocutory order is not subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-863 (1978); *Cogen* v. *United States*, 278 U.S. 221, 222-224 (1929). The same considerations that militate against interlocutory appeal of a motion to dismiss also counsel against interlocutory review by this Court. If petitioner is acquitted at his trial—a proceeding that has already been delayed by more than one year—his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all of his contentions to this Court by seeking review of the final judgment. In short, petitioner's claim "is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967); see *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

In any event, the court of appeals properly construed Section 1014. The government's proffer of evidence showed that petitioner purposefully issued and deposited worthless checks, knowing that various banks would extend credit to his company and his co-conspirator based on the purported value of those securities (Pet. App. 3a-4a). In other words, petitioner willfully "ma[d]e * * * false statement[s and] overvalue[d] * * * securit[ies], for the purpose of influencing * * * the action of * * * bank[s] the deposits of which are insured by the Federal Deposit Insurance Corporation * * * upon any * * * advance * * * or loan * * *." 18 U.S.C. 1014. No court of appeals has adopted a contrary construction of Section 1014, and further review of this question is unwarranted.

Petitioner nonetheless argues (Pet. 6-9) that the issuance of a series of worthless checks as the basis for obtaining credit does not constitute the overvaluation of a security within the meaning of Section 1014. But Congress has elsewhere specifically defined "security" to include a check (18 U.S.C. 2311), and there is no reason to construe Section 1014 more narrowly. Moreover, there is no doubt that petitioner knowingly overvalued those worthless securities in obtaining credit. As the court of appeals explained (Pet. App. 5a):

> If payment of the check depends on the deposit of the check of another, the necessary implication is that the other's check will be paid from an account having funds at least equivalent to the face amount of the check. We consider that the necessary implications which a check carries, and of which [petitioner was] fully aware, are the legal equivalent of a representation or statement as to the value of the checks. Here, we are not dealing with a man careless in balancing his check book. We have here two business men who contrived a kiting scheme that would have the effect of giving them *credit* or a *loan* or an *advance* on their false representation of the value of their checks.[3]

Petitioner also erroneously asserts (Pet. 9-11) that Section 1014 is limited solely to fraud in connection with farm and home loans. To be sure, as originally enacted, Section 1014 was a compilation of 13 earlier laws primarily concerning misrepresentations to government agencies with regard to farm and home loans. See Act of June 25, 1948, ch. 645, 62 Stat. 752; *United States* v.

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[3]Likewise, petitioner's use of worthless checks constituted a false statement in violation of Section 1014. Petitioner's further claim (Pet. 8-9) that the checks were not worthless is a question of fact to be determined at trial.

Sabatino, 485 F. 2d 540, 543 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974). Even the original version of Section 1014, however, covered at least two federal agencies that issued loans unrelated to farm or home construction. See Pet. App. 8a (Federal Reserve Bank and Reconstruction Finance Corporation). Furthermore, in 1970 Congress expanded the scope of Section 1014 to include banks and similar institutions insured by either the FDIC or the FSLIC. It is thus beyond dispute that Section 1014 is not restricted to home and farm loans, but rather covers "all undertakings which might subject the FDIC insure bank to risk of loss." *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (10th Cir. 1978); see *United States* v. *Sabatino*, *supra* (auto loans).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Petitioner's contention (Pet. 11-14) that Section 1014 is unconstitutionally vague is without merit. See, *e.g.*, *United States* v. *Stoddart*, *supra*, 574 F. 2d at 1053; *United States* v. *Sabatino*, *supra*, 485 F. 2d at 542. See also *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963). The statute broadly proscribes the use of misrepresentations and overvalued securities to obtain credit -- precisely the offense that is alleged to have occured here.